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Supreme Court, U.S.
FILED
OCT 15 2008
OFFICE OF THE CLERK

No. 08-195

IN THE
Supreme Court of the United States

COUNTY OF ORANGE,

Petitioner,

v.

FRED PIERCE, TIMOTHY LEE CONN, FERMIN VALENZUELA, and LAURIE D. ELLERTSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' OPPOSITION BRIEF

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QUESTIONS PRESENTED

I. DID THE NINTH CIRCUIT CONDUCT A NARROW FACT SPECIFIC INQUIRY INTO OUT-OF-CELL EXERCISE REQUIREMENTS FOR PRE-TRIAL DETAINEES UNDER THE FOURTEENTH AMENDMENT AND NOT ISSUE A BRIGHT-LINE RULE UNDER THE EIGHTH AMENDMENT, AS PETITIONER CONTENDS?

II. DID THE NINTH CIRCUIT CORRECTLY APPLY THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW TO THE TWO FACTUAL FINDINGS AT ISSUE IN THE PETITION?

III. DID THE NINTH CIRCUIT PROPERLY DELEGATE TO THE DISTRICT COURT RESPONSIBILITY FOR DETERMINING HOW THE COUNTY COULD BEST ADJUST PROGRAM AND SERVICE OFFERINGS TO ACCOMMODATE THE NEEDS OF DISABLED DETAINEES?

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SUMMARY OF THE ARGUMENT

Review should be denied on the questions presented as Petitioner cannot show that the Ninth Circuit's decision below is in conflict with a decision of this Court, much less that it creates a conflict on an important federal question within the circuits.

Petitioner's assertion that the decision creates an inter-circuit conflict on the issue of outdoor exercise requirements in correctional settings is without basis. The Ninth Circuit did not announce a "bright line" rule that ninety minutes of weekly exercise constitutes cruel and unusual punishment under the Eighth Amendment. Neither the Eighth Amendment nor the "cruel and unusual punishment" standard are discussed anywhere in the opinion, which instead applies only to pre-trial detainees and relies only on the Fourteenth Amendment. The court below applied the correct legal standards and issued a narrow fact-specific finding, drawing on well-accepted law from other circuits, which properly considered the unique circumstances facing administrative segregation detainees in the Orange County jails. There is no conflict between this opinion and that of this Court or any circuit.

Petitioner's argument that *certiorari* should be granted to review two factual findings reversed by the Ninth Circuit does not raise any "compelling reasons" for Supreme Court review. The Ninth Circuit affirmed the vast majority of the factual findings by the district court. With respect to the two factual findings that the Ninth Circuit overturned, the Ninth Circuit did so only after concluding that the district court's findings were unsupported by and contrary to the record. The Ninth

Circuit's methodology was appropriate, and further appellate review is unwarranted.

Finally, Petitioner seeks review of the Ninth Circuit's decision to remand to the district court for further fact-finding as to whether and how the Orange County jails could provide more equal access to disabled detainees to the services and programs provided to non-disabled detainees. Petitioner cannot point to any inter-circuit conflict or conflict with an opinion of this Court, but rather seeks *certiorari* because of budget constraints which it claims may reduce the overall programs and services provided to detainees. Given the Ninth Circuit's instructions to the district court that absolute parity in programming need not be achieved and that correctional concerns should be given proper consideration, the decision should not be disturbed. The district court should be permitted to conduct the type of fact-finding necessary to address denial of program access under the Americans with Disabilities Act, 42 U.S.C. §12132.

REASONS FOR DENYING THE PETITION

I. BECAUSE THE NINTH CIRCUIT DID NOT RULE THAT NINETY MINUTES OF EXERCISE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT OR EVEN APPLY EIGHTH AMENDMENT STANDARDS, THIS CASE CREATES NO INTER-CIRCUIT CONFLICT

Petitioner asserts incorrectly that the Ninth Circuit announced below a "bright line rule that ninety minutes of weekly exercise constitutes cruel and unusual punishment" under the Eighth Amendment, and based on this, argues that an inter-circuit conflict now exists. Pet. at 8. The Ninth Circuit, however, did not apply the Eighth Amendment analysis, nor once mention "cruel and unusual punishment," as this case involves pre-trial detainees, whose rights are protected under the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment. Significantly, every one of the cases cited by Petitioner as evidence of a conflict within the circuits involved the rights of prisoners (governed by the Eighth Amendment), as opposed to the greater rights afforded to pre-trial detainees. *See, e.g., Bailey v. Shillinger,* 828 F.2d 651, 652 (10th Cir. 1987) (prisoner convicted of first degree murder and then sentenced to heightened security after murdering another prisoner); *Rodgers v. Jabe,* 43 F.3d 1082, 1084 (6th Cir. 1995)(prisoner in maximum security who engaged in such serious misconduct while in prison that he was placed in detention, where he complained about lack of exercise); *Wishon v. Gammon,* 978 F.2d 446 (8th Cir. 1992)(prisoner who was allowed significant out-of-cell time each week for meetings, visits, medical care, phone calls and haircuts); *Caldwell v. Miller,* 790 F.2d 589, 600 (7th Cir.

1986)(prisoner's claim of inadequate exercise reviewed under Eighth Amendment).

These cases have no precedential value for the question of a pre-trial detainee's right to outdoor exercise. This Court has long held that for conditions of confinement in *prisons* to constitute cruel and unusual punishment within the meaning of the Eighth Amendment, the conditions "must . . . involve the wanton and unnecessary infliction of pain, [or] be grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

A very different standard applies to pre-trial detainees, who have not been convicted of any crime. Pre-trial detainees are protected by the Fourteenth Amendment's Due Process Clause. Under the Due Process Clause, detainees have a right against any jail conditions or restrictions that "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520 (1979). This Court in *Bell* underscored that this standard differs significantly from the standard relevant to convicted prisoners. *Id.*, at 535, n. 16. The Ninth Circuit below expressly incorporated the proper standard of review announced in *Bell*, in concluding that ninety minutes of exercise per week, on the facts before the court, "constitutes punishment for purposes of § 1983." App. 49.

Petitioner distorts the holding of the court below, failing to bring to this Court's attention that the cases on which it relies all involved prisoners and different constitutional standards than those which apply to pre-trial detainees. Moreover, Petitioner states no less than four times in its petition that the Ninth Circuit held that less than two hours of exercise a day constitutes "cruel and unusual punishment." (Pet.

Brief at 10 and 14.) Petitioner goes so far as to state: "the declaration that 90 minutes of week exercise constitutes cruel and unusual punishment has brought to an intense boil what up to now might have only been a simmering circuit conflict." (Pet. Brief at 14.) These statements are plainly inaccurate as the Ninth Circuit did not once refer to the Eighth Amendment standard, did not use the expression "cruel or unusual" anywhere in its discussion and nothing in the opinion could be construed to apply to prisoners. Moreover, Petitioner tellingly omits any mention of *Bell v. Wolfish*, the leading opinion from this Court explaining the constitutional standards for evaluating pre-trial detainees' constitutional rights.

Examination of the actual cases cited by Petitioner as part of this "boiling" inter-circuit conflict, reveal that not only do they all involve convicted prisoners, but many are decided on facts far different than those considered here. For example, in *Rodgers*, 43 F.3d 1082, the question before the Sixth Circuit was whether a prisoner in punitive detention for "major misconduct" violations was entitled to out-of-cell exercise. The court held that in the Sixth Circuit there was no clearly established right to out-of-cell exercise while in punitive detention, thereby granting qualified immunity to prison officials. This holding is not at odds with the *Pierce* decision, as *Pierce* did not concern prisoners, and did not consider the question of constitutional minimums for those who, while in custody, have engaged in misconduct sufficient to warrant *additional* punishment.[1]

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[1] The other cases from the Sixth Circuit relied upon by Petitioner are also not in conflict with the *Pierce* decision. In *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983), the court held

The Tenth Circuit's decision in *Bailey*, 828 F.2d at 652, also does not create an inter-circuit conflict, as it too relates to the treatment of prisoners. While the court there found that one hour per week of exercise did not amount to the "wanton and unnecessary infliction of pain," the standard for cruel and unusual punishment, the court did not consider whether one hour per week would have satisfied constitutional requirements for pre-trial detainees. Similarly, in *Caldwell*, 790 F.2d 589, the Seventh Circuit considered whether an hour of weekly outdoor exercise in the prison context constituted cruel and unusual punishment, concluding because the plaintiff could not meet the Eighth Amendment standard of "unnecessary or wanton pain," he had failed to establish a constitutional violation.

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that the denial of outdoor exercise could be a constitutional violation depending on certain facts which had not been developed sufficiently in the record, e.g. size of cell, opportunity for contact with other inmates, and time per day allowed outside of the cell. The court did not opine one way or another as to what the minimum might be for detainees held in administrative segregation, such as here, without contact with other detainees or time outside the cell.

In *Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985), the court again did not rule out minimum exercise time for prisoners. The case was remanded to the district court because the jail gave less exercise to prisoners in administrative segregation than to those in general population, conflicting with the principle announced in *Patterson* that prisoners in more isolated settings might be entitled to more rather than less out-of-cell exercise. *Walker approved* the Ninth Circuit's decision in *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979), that five hours of outdoor exercise per week are required for those inmates who were "permanently confined virtually the entire day in one cell, received 'meager' outside movement, and engaged in minimal prisoner contact." *Id.*, at 927.

Petitioner also insists that a conflict between the circuits may have existed even before the publication of the *Pierce* decision, but here again Petitioner relies on inapplicable cases interpreting Eighth Amendment standards for convicted prisoners. For example, Petitioner points to *Peterkin v. Jeffes*, 855 F.2d 1021 (3rd Cir. 1988), as an example of conflicting case law, yet *Peterkin* refused to reach the constitutional question of what is a required minimum, merely holding that two hours per day, as provided to the particular prisoners in that case, was not unconstitutional under the Eighth Amendment. *Ruiz v. Estelle,* 679 F.2d 1115, 1152 (5th Cir.1982),also did not create conflicting law as the 5th Circuit there merely found that it was not an abuse of discretion under the unique facts of the case for the district court to require convicted prisoners to receive one hour per day of out-of-cell exercise, *Ruiz*, however, set no constitutional minimum for all prison settings. Similarly, *Davenport v. DeRobertis,* 844 F.2d 1310, 1316 (7th Cir. 1988), is limited to its facts; the Seventh Circuit held that it was not an abuse of discretion for the district court to issue a "fact specific" order that five hours of out-of-cell exercise was required each week for prisoners who were otherwise required to spend "165 out of 168 hours in a 90-square-foot cage."

In sum, each of the cases relied upon by Petitioner to urge this Court to resolve a supposedly urgent and compelling inter-circuit conflict involves examination of an entirely different constitutional amendment, different constitutional standards, and different unique facts.[2]

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[2] In a footnote, Petitioner also claims there is an inter-circuit conflict because several circuits require "proof of injury" to

Nor is review warranted on the ground that the opinion's handling of pre-trial detainee exercise conflicts with relevant federal decisional law. The basic premise underlying the Ninth Circuit's opinion – that meaningful recreation "is extremely important to the psychological and physical well-being of the inmates" – is virtually unquestioned in the circuit courts. *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979). *See also Ruiz, supra* 679 F.2d at 1152 ("Inmates need regular exercise to maintain reasonably good physical and psychological health"); *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983); *Campbell v. Cauthron*, 623 F.2d 503, 506-07 (8th Cir. 1980); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976); *Loe v. Wilkinson*, 604 F. Supp. 130, 135 (M.D. Pa. 1984); *Peterkin, supra* 855 F.2d at 1031; *Delaney v. DeTella*, 256 F.3d 679 (7th Cir. 2001)("Given current norms, exercise is no longer considered an optional form of recreation, but is instead a necessary requirement for physical and mental well-being" in correctional settings).

While Petitioner argues that the Ninth Circuit

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establish an Eighth Amendment violation, and the court in *Pierce* did not require plaintiffs to prove that denial of exercise caused an actual injury. There is no conflict, however, because *Pierce* is decided under the Fourteenth Amendment's Due Process Clause and no court has required "proof of injury" in evaluating whether jail conditions amount to punishment under the Fourteenth Amendment; that inquiry, to the extent some courts have adopted it, relates only to Eighth Amendment claims of "cruel or unusual" punishment. *French v. Owens*, 777F.2d 1250, 1255 (7th Cir. 1995) (prisoners seeking relief under Eighth Amendment); *Hosna v. Groose*, 80 F.3d 298, 307 (8th Cir. 1986) (same); *Women Prisoners of the District of Colombia Dept. of Corrections v. District of Columbia*, 93 F.3d 910 (D.C.Cir. 1996)(same).

has now created a "bright line" requirement for outdoor exercise which applies to all penal settings, this seriously misstates the opinion below. The Ninth Circuit, in fact, engaged in the type of "fact specific," careful analysis cautioned by all of the courts, including the Ninth, in considering claims to outdoor exercise in correctional settings. As had been the case in *Spain*,[3] and subsequent Ninth Circuit decisions, the *Pierce* panel analyzed the particular group of detainees asking for outdoor exercise and evaluated the particularly circumstances of their incarceration to determine whether a certain amount of exercise was insufficient. Indeed, the Ninth Circuit cited Tenth Circuit law in announcing the factors courts should review: "determining what constitutes adequate exercise requires consideration of 'the physical characteristics of the cell and jail and the average length of stay of the inmates.'" App. at 46, citing *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994).

In so ruling, the Ninth Circuit's opinion is fully consistent with that of other circuits, holding that any determination of whether jail or prison conditions meet constitutional requirements for exercise, must examine such factors as overall condition of the jails, average length of incarceration and amount of out-of-cell time. *See, e.g., Union County Jail Inmates v. Di Buono*, 713 F.2d 984, 1000-1001 (3rd Cir. 1983) (in assessing "the totality of circumstances relevant to any alleged constitutional deficiency in shelter," courts should

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[3] Rather than expanding the constitutional standard announced nearly 30 years ago in *Spain*, the Ninth Circuit here may indeed have restricted it, finding only two hours of outdoor exercise minimally required and not the five hours per week announced in *Spain*.

consider, in addition to the "general state of repair and function of the facilities provided," the length of confinement in the prison, and how much time prisoners must spend in their cells each day); *see also Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1988).

Ultimately, the Ninth Circuit held that pre-trial detainees in the type of administrative segregation system used by Orange County are entitled to at least two hours of outdoor exercise per week. These detainees are those who, the court found, by definition have no access to other detainees and are kept locked in their individual cells at least 22 hours per day. (App.46). The court also found that the average stay for such detainees was 110 days, with those accused of "three strike" offenses spending an average of 312 days in jail. *Id.* Thus, the panel's decision is fully consistent with the very requirement which Petitioner seeks to impose, namely that the inquiry be fact-specific and not a bright-line rule applicable to all detainees and all custodial settings.

The *Pierce* decision follows other circuit decisions that denial of exercise in certain circumstances can violate the constitution's requirements for confinement of pre-trial detainees. For example, *Pierce* cites and follows the Eighth Circuit's decision in *Campbell,* 623 F.2d 503 at 508, which held that pre-trial detainees are generally entitled to one hour of exercise outside of their cells daily if they spend more than sixteen hours in their cells daily, and the Tenth Circuit's conclusion in *Housley*, 41 F.3d at 599, that "'a failure to provide inmates (confined for more than a very short period ...) with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions'").

Finally, in terms of the actual results at issue, the amount of exercise found required by the Ninth Circuit imposes a very low bar, far below the amount of exercise recommended by correctional experts and followed in correctional facilities throughout the nation. For example, the district court in *Peterkin* found that nationwide, prisons provide an average of three hours of daily outdoor exercise for death-sentenced inmates, *far more than the two hours per week allotted here. See Peterkin v. Jeffes*, 661 F. Supp. 895, 911 (E.D.Pa. 1987) (emphasis added). Similarly, the Seventh Circuit in *Davenport*, in upholding the district court's determination that one hour per week for prisoners kept in small cage-like cells was inadequate, noted that "[a] knowledgeable witness testified that he [knew] of no other prison in the United States, including the federal penitentiary at Marion, Illinois--the nation's highest-security prison--that allows inmates of its segregation unit so little time for out-of-cell exercise." 844 F.2d at 1315. Thus, the Ninth Circuit's relatively limited requirement of two hours per week of outdoor exercise for the detainees under consideration cannot be construed as imposing a difficult minimum which will cause any hardship or disruption to jail facilities in other circuits, given that few are likely to fall below this standard in the first place.

II. THE NINTH CIRCUIT CORRECTLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW TO THE TWO FACTUAL FINDINGS AT ISSUE IN THE PETITION

The only issue raised in Part II of the petition is whether the Ninth Circuit erred in holding two of the district court's dozens of factual findings clearly

erroneous. Specifically, Petitioner argues that the Ninth Circuit misapplied the "clearly erroneous" standard of review to the district court's two discrete findings that: (1) disabled detainees had equal access to programs at the jails; and (2) the existence of physical barriers in the jails did not rise to the level of an ADA violation. Petitioner does not assert that the Ninth Circuit articulated the wrong standard of review, or that the Ninth Circuit erred in its review of the district court's numerous other factual findings. Part II of the petition simply does not raise any "compelling reasons" for Supreme Court review because the Ninth Circuit has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of [the] Court's supervisory power." S. Ct. Rule 10. Accordingly, the petition should be denied.

A. The Ninth Circuit Affirmed The Majority of the District Court's Factual Findings

The narrow nature of Petitioner's request for review is evident when assessed in the context of the entire Ninth Circuit opinion. The Ninth Circuit affirmed all of the district court's pretrial and evidentiary rulings, deferring, for example, to the lower court's discretion to hear all of the evidence in a complex class-action lawsuit in six days. App. 15-27. The Ninth Circuit also affirmed the majority of the district court's factual findings. Significantly, the Ninth Circuit affirmed the district court's class-wide factual findings that termination of eleven of the fourteen *Stewart* Orders was appropriate. App. 32-37, 50. In this portion of its opinion, the Ninth Circuit explicitly agreed with the district court's findings that the *Stewart* Orders related to reading materials,

mattresses and beds, law books, population caps, sleep, blankets, telephone access, communications with jailhouse lawyers, seating, meal times and day room access were no longer needed to correct ongoing constitutional violations. *Id.*

Although the Ninth Circuit held that the district court clearly erred in terminating the two *Stewart* Orders relating to religious services and exercise, Petitioner does not argue in the body of the petition that these holdings constitute error or warrant Supreme Court review.[4] Thus, the Ninth Circuit's review of the district court's factual findings regarding the constitutional issues applicable to the entire *Pierce* class is not at issue in this petition.

The Ninth Circuit also affirmed a significant portion of the district court's treatment of ADA issues related to a subclass of mobility- and dexterity-impaired detainees. For example, the district court "found the evidence to show that 'the Orange County jails have not yet been brought into full ADA compliance. In 2000, Orange County adopted a Transition Plan to move existing facilities toward ADA compliance. That plan was directed more toward structural modifications of public and visitor areas than toward compliance in detainee areas.'" App. 60 (quoting the district court's decision). The district

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[4]Presumably, Petitioner does not seek review of this aspect of the Ninth Circuit's decision because the district court failed to cite a single piece of evidence to support its conclusory statements that the *Stewart* Orders regarding religious services and outdoor exercise were no longer necessary. App. 92-94 (exercise), 95-96 (religious services). The Ninth Circuit, by contrast, set forth a detailed analysis supporting its holdings that the district court clearly erred in its findings in these two areas. App. 37-49.

court relied on the testimony of Plaintiffs' expert, Peter Robertson, who "'identified various specific architectural barriers and features that are out of compliance with the ADA.'" App. 60-61.

The Ninth Circuit affirmed these findings as "clearly supported by the record," and listed several examples of architectural barriers that failed to comply with the ADA. App. 61-63. The Ninth Circuit observed that Mr. Robertson testified "at length" regarding the deficient architectural barriers and features, and that defendants' expert, Ron Bihner, did not dispute Mr. Robertson's testimony. The Ninth Circuit further noted that Mr. Bihner conceded that a number of architectural barriers and features, such as showers, toilets and sinks, were not accessible to mobility-impaired detainees. App. 62.

The Ninth Circuit also affirmed the district court's finding that segregating disabled detainees was reasonably related to legitimate penological interests, and that mainstreaming was therefore not appropriate. To support its deference to the lower court's findings, the Ninth Circuit observed that "Sheriff's Department officials testified at some length regarding the security concerns related to housing mobility- and dexterity-impaired detainees with non-disabled detainees. The district court's finding that Plaintiffs did not refute this evidence is not clearly erroneous." App. 68. The Ninth Circuit further affirmed the district court's factual finding that disabled detainees need not be given access to the "Best Choice Program" (a drug rehabilitation program) because of security concerns. App. 72 n. 39.

As this discussion makes clear, the nature of the review that Petitioner seeks is extremely limited. The

Ninth Circuit affirmed the majority of the district court's factual findings. None of the factual findings with respect to the class-wide constitutional claims is at issue. The Ninth Circuit also affirmed many of the district court's factual findings regarding the ADA issues. The limited nature of the review sought serves to distinguish this case from *Anderson v. Bessemer City*, 470 U.S. 564 (1985), upon which Petitioner relies extensively. In *Bessemer*, the Court of Appeals engaged in a *de novo* review of the district court's factual findings, and reversed nearly all of the key findings made by the court. Here, the Ninth Circuit did no such thing. The Ninth Circuit in fact affirmed most of the key findings made by the district court, and, as discussed in the next section, adhered to the *Bessemer* guidelines for reviewing district court findings for clear error. For these reasons, the Supreme Court should decline to grant review here.

B. The Ninth Circuit Correctly Applied the Clearly Erroneous Standard to Overturn Two District Court Findings that Were Unsupported by and Contrary to the Record

With respect to the two factual findings that the Ninth Circuit overturned, the Ninth Circuit did so only after concluding that the district court's findings were unsupported by and contrary to the record. The Ninth Circuit's methodology was appropriate, and further appellate review is unwarranted.

1. The Ninth Circuit Correctly Overturned the District Court's Finding With Respect to Architectural Barriers

First, with respect to architectural barriers, the Ninth Circuit concluded that the district court clearly erred when it concluded that Plaintiffs had failed to show the existence of reasonable accommodations that would enable them to make use of the facilities. The Ninth Circuit cited the testimony of Plaintiffs' expert, Mr. Robertson, which included "site-specific suggestions of structural, as well as non-structural, accommodations." App. 64. As noted by the Ninth Circuit, Mr. Robertson proposed specific architectural changes such as repositioning the sinks or replacement of controls, and he also offered solutions like making an inaccessible drinking fountain accessible by adding a cup dispenser. In making these proposals, Mr. Robertson relied upon established federal guidelines which set forth the minimum standards for structural changes. *Id.*

Petitioner argues that the Ninth Circuit failed to defer to the district court's finding that Mr. Robertson's testimony was "limited" because he did not include any "analysis" or "proposal" about how effective modifications could be made. However, the Ninth Circuit appropriately rejected the district court's characterization of Mr. Robertson's testimony because the record plainly shows that Mr. Robertson *did* provide analysis and specific proposals about how architectural barriers could easily be modified, such as adding a cup dispenser to inaccessible drinking fountains.

The Ninth Circuit held that the lower court's

finding that the jails did provide "other curative methods" to inmates with disabilities was also unsupported by the record. Based on the evidence in the record, the only architectural barriers that were remedied by "other methods" were small surface-elevation changes, such as ridges or curbs. The Ninth Circuit acknowledged the evidence that deputies guided wheelchairs over curbs. However, the Ninth Circuit's review of the entire record revealed that the County failed to present evidence that any of the other numerous architectural barriers were addressed in any way. Indeed, Petitioner does not point to any evidence in the record showing that the County effectively addressed architectural barriers other than small surface-elevation changes. Surely if such evidence existed, Petitioner would identify it.

By contrast, Plaintiffs presented virtually unrebutted evidence that architectural barriers were a substantial problem for disabled detainees. One of the class representatives, Timothy Conn, testified that he had to rely on other inmates for assistance when he needed to use inaccessible bathroom facilities. Similarly, Mr. Robertson actually saw detainees – not deputies – streuggling to lift a detainee in a wheelchair over a foot-high retention wall in one of the inaccessible showers. In light of this evidence, the Ninth Circuit held that the district court clearly erred when it concluded that Plaintiffs had failed to show the existence of reasonable accommodations that would enable them to make use of the facilities.

Petitioner arguer that the Ninth Circuit failed to give due deference to the district court's finding that the County's failure to comply with the ADA in certain areas was "within the reasonable requirements of effective prison administration." App. 100. However,

the district court did not cite a single piece of evidence to support this conclusory finding, and Petitioner does not point to any evidence in the record that would support such a finding. The Ninth Circuit noted: "The County did not posit *any legitimate rationale* for maintaining inaccessible bathrooms, sinks, showers, and other fixtures in the housing areas and common spaces assigned to mobility- and dexterity impaired detainees." App. 66 (emphasis added). Further, the Ninth Circuit observed that County counsel's "vague assertions" about the cost of accommodations did not constitute evidence, and "could not be construed as a legitimate basis for failing to comply with the ADA." App. 66-67. Indeed, neither the district court nor Petitioner cites to *any* evidence in the record to support a finding that accommodating disabled detainees would be too costly. For these reasons, the Ninth Circuit appropriately reversed the district court's finding that Plaintiffs had not established the existence of reasonable accommodations that would enable them to make use of the facilities.

2. The Ninth Circuit Correctly Overturned the District Court's Finding With Respect to Access to Programs, Services and Activities

The second supposed error that Petitioner identifies is the Ninth Circuit's holding that the district court clearly erred when it found that disabled detainees had equal access to the programs, services and activities in the Orange County Jails. Petitioner asserts that the Ninth Circuit erred because the County presented "substantial evidence to support the district court's findings related to the availability of programs and services at the Central Jail" to disabled

detainees.[5] However, Petitioner does not cite this "substantial evidence," and points only to three pages of testimony from Captain Board to support the claim that programs, services and activities are equally available to disabled detainees as non-disabled detainees. App. 24 & n.8. Petitioner asserts that Captain Board testified that disabled detainees "have access to" work programs. This is not what Captain Board testified. Here is the entirety of Captain Board's testimony regarding the supposed availability of the Community Work Program to detainees with mobility impairments:

> Q: Is there any reason why a wheelchair-bound inmate who was, otherwise, qualified, i.e., passed whatever physical requirements were necessary for the job, et cetera, would be precluded from that program?
>
> A: The – the only thing that I can think of that would preclude someone from participation is someone with a disability, would be a work location that could accommodate that disability.

Ct. App. SER 13210:5-12 (Vol. 44). Captain Board never testified that the Community Work Program – or any other work program – was, in fact, offered to detainees in wheelchairs, or that any wheelchair-bound detainee had ever actually participated in any work program offered by the County. He never testified that the County had identified work locations that could accommodate a disability. At most, he testified to a hypothetical situation – that there was only one reason

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[5]As of 2004, mobility- and dexterity impaired detainees were housed exclusively at the Central Jail, and not at the Musick or Theo Lacy facilities. App. 67-68.

he could think of why a disabled inmate wouldn't be able to participate in a work program. The County simply made no showing that work programs were actually available and offered to wheelchair-bound detainees.

Petitioner further asserts that Captain Board testified that mobility-impaired detainees "have access to" rehabilitation and education programs at the Central Jail. Again, this overstates Captain Board's testimony. Here is the entirety of Captain Board's testimony in these two areas:

> Q: [C]an you tell us what sort of [rehabilitation] programs are offered at the Central Men's Jail, Central Women's Jail?
>
> A: They would have things similar to your – your typical Alcoholics Anonymous-type of a program. However, it would be – it could be focused on either alcohol or drugs. They would offer classes, so many classes per week at any of our facilities.
>
> Q: Okay. Other than – than substance abuse programs, what other programs does the Orange County Sheriff's Department offer at the Central Women's Jail and Men's Central Jail?
>
> A: They offer education programs. Some inmates work towards their G.E.D.'s while in custody, computer classes, those – those sorts of things.
>
> Q: Are any of those classes – are wheelchair-bound inmates precluded from participating in any of those programs?
>
> A: No.
>
> Q: Okay. I think Mr. Conn testified that

someone told him that only sentenced inmates could participate in those programs; is that true?

A: Not to my knowledge.

Ct. App. SER 13211:10-13212:4 (Vol. 44).

Again, Captain Board did not testify that rehabilitation programs or educational classes were in fact offered or made available to wheelchair-bound detainees, or that any such detainees had ever actually participated in such programs. He simply testified that, to his knowledge, wheelchair-bound inmates were not technically precluded from participating. This is far from the showing that is required by the ADA – to wit, that the County "operate[d] each service, program or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 CFR 35.150(a).

More significant, as the Ninth Circuit pointed out based on its review of the entire record, several Sheriff's Department officials testified to the extensive programs, services and activities that are offered to non-disabled inmates at the Theo Lacy and Musick facilities, from which disabled detainees are categorically excluded. "For example, programs in agriculture, woodworking, and welding were among the vocational opportunities available at Musick or Theo Lacy, but not available at the Central Jail Complex." App. 69. Sheriff's Department officials also testified to the extensive recreational opportunities available to non-disabled detainees at Musick and Theo Lacy, including "a softball field, volleyball courts, pool tables, and other indoor and outdoor facilities." *Id.* The Ninth Circuit concluded that the County "has

offered no explanation or justification, either in district court or on appeal, for the significant differences between the vocational and recreational activities available at Theo Lacy and Musick, and those available to either able or disabled detainees at the Central Jail. As such, the County has not raised the defense that a policy of restricting access to these programs, services, or activities is reasonably related to a legitimate government objective." App. 72 (citation omitted).

In the second section of their petition, Petitioner does not even mention the Ninth Circuit's discussion of the programs and services available at Theo Lacy and Musick. Petitioner continues to offer no explanation or justification regarding the significant differences between the programs and services offered to disabled and non-disabled detainees. The County does not point to any evidence offered below showing that the programs and services offered at the Central Jail are similar to the programs and services offered at Musick and Theo Lacy. It does not point to any evidence supporting a legitimate penological justification for the disparity in programs and services offered.[6] On this basis, the Ninth Circuit appropriately remanded the case so that the district court could make further factual findings regarding the feasibility of either redistributing some of the programs from Musick and Theo Lacy to the Central Jail, or determining another

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[6] Petitioner cites Board's testimony that it would be dangerous to house mobility-impaired detainees with the general population, but, as noted above, the Ninth Circuit *upheld* the district court's finding that legitimate penological concerns justified the segregation of disabled detainees. App. 68. Further, the Ninth Circuit *upheld* the district court's finding that legitimate penological concerns justified the exclusion of inmates from the Best Choice program, a rehabilitation program. App. 72 n. 39.

appropriate remedy. The district court clearly erred, and further appellate review is unnecessary.

3. The Ninth Circuit's Decision With Respect to the ADA Issues is not Final Because it Requires The District Court To Make Further Factual Findings

The Court should decline to grant the *certiorari* petition at this time because the Ninth Circuit's decision with respect to the ADA issues is not yet final. The Ninth Circuit ordered the district court to make further factual findings in two areas involving the ADA: (1) Whether any of the programs at the Theo Lacy or Musick facilities could also be offered to disabled detainees at the Central Jail; and (2) The nature and extent of the physical architectural barriers that currently exist, given the time lapse between the trial and the Ninth Circuit's decision. App. 67, 72, 74, 81 (ordering remand for further proceedings). Because the Ninth Circuit ordered further factual findings, it did not order any injunctive relief with respect to the ADA.

It is possible that the district court will make factual findings that will obviate the need for further appellate review in this case. For example, it is possible that Orange County will be able to show that, since the trial in 2005, it has made significant improvements in removing the architectural barriers in the jails. Or, it is possible that Orange County will be able to show that, for legitimate penological reasons, the programs at Theo Lacy and Musick cannot be offered to inmates with disabilities at the Central Jail (or that disabled detainees are now housed at these facilities and participating fully in their program

offerings). If Orange County is able to make either of these showings, the landscape of the ADA issues will change significantly. The Supreme Court should permit the district court to make the additional findings required by the Ninth Circuit and should not grant review at this time.

Further, if the Supreme Court grants certiorari now and affirms the portions of the Ninth Circuit's decision on the ADA, the lower court will have to make further factual findings and then either enter injunctive relief or decline to enter injunctive relief. Either way, it is likely that the losing party will again appeal to the Ninth Circuit for further review of the ADA issues. The Court should avoid "the inconvenience and costs of piecemeal review," and should instead wait until the district court has made the required further factual findings. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).[7]

III. THE NINTH CIRCUIT PROPERLY DELEGATED TO THE DISTRICT COURT RESPONSIBILITY FOR DETERMINING HOW THE COUNTY COULD BEST ADJUST PROGRAM AND SERVICE OFFERINGS TO ACCOMMODATE THE NEEDS OF DISABLED DETAINEES

Petitioner states in the "Question Presented" section that the Ninth Circuit in this case has now held that "the County of Orange violated 42 U.S.C. § 12132 of the Americans with Disabilities Act by not offering to physically disabled inmates housed at one detention

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[7]The Court may, of course, grant certiorari at a later time and review all of the issues that Petitioner raises in the current petition. *Hughes Tool Co. v. TWA*, 409 U.S. 363, 365 n.1 (1973).

facility every program and activity offered at two other detention facilities." Petition, at (i). This statement, however, does not accurately reflect the holding of the Ninth Circuit, which was far narrower, imposed no explicit mandate of program access and delegated to the district court the task of further fact-finding to assess the reasonableness of the County's provision of services and programs to disabled detainees. The actual holding of the Ninth Circuit was not ground-breaking; the court held merely that any program or activity "offered to nondisabled detainees should, when viewed in its entirety, be similarly available to disabled detainees who, with or without reasonable accommodations, meet the essential eligibility requirements to participate," unless the county can establish that "restriction on access is reasonably related to a legitimate government objective." App. 71.

Petitioner does not articulate what basis exists under the Supreme Court Rules for taking this case for review based on this aspect of the opinion. It acknowledges there is no circuit split on this issue. Absent a circuit split on an important matter, this Court may grant *certiorari* in its discretion, where a decision of a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Here, Petitioner cannot show that the circuit court's decision is in any conflict with a decision of this Court, much less that it creates a conflict on an important federal question.

In reaching its holding with respect to the ADA claim, the Ninth Circuit closely followed the Supreme Court decision in *Pa. Dep't of Corr. v. Yeskey* 524 U.S. 206, 209, 210 (1998), which held that because the ADA applies to correctional facilities, an inmate cannot be

categorically excluded from a beneficial prison program based on his or her disability alone. App. at 70, citing *Yeskey,* 524 U.S. at 210 ("Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners. . . .")

Based on undisputed evidence before the district court, the Ninth Circuit found that disabled detainees were segregated in one facility (the Central Jail complex) and barred from two other facilities (Theo Lacy and Musick) which had superior services, including a drug rehabilitation program ("Best Choice Program"), agriculture, woodworking, and welding, off-site or community work projects, and access to a softball field, volleyball courts, pool tables, and other indoor and outdoor facilities. App. 69.

In no way did the Ninth Circuit impose on the County a strict requirement that it offer every program to every disabled person at every facility. Petitioner's assertion that the Ninth Circuit "held that the ADA does not permit any lack of uniformity" App. 28, is contradicted by the opinion itself, which states in two separate places that the ADA does not require "perfect parity" in program offerings. App. 70, 72. Instead, the Ninth Circuit repeatedly instructed that the evidentiary record needed to be developed and that assessment of the reasonableness of the County's provision of services and programs could not be made until such record was developed.

Further, the Ninth Circuit cautioned the district court against imposing any type of absolute rule on the jails which did not take into account security concerns and the competing needs of its jail population. Indeed,

the Ninth Circuit rejected the very rule that petitioner would have this court believe it adopted. The court stated unequivocally that "[t]he ADA does not require perfect parity among programs offered by various facilities that are operated by the same umbrella institution." App. 70. The court further held that the County need not make all of its existing facilities accessible to individual with disabilities. App. 71. "We also emphasize," the court explained, "that the district court should look at the offerings as a whole and in their entirety and thus the court is not required to ensure that each individual program or service offered at Theo Lacy or Musick is offered in complete parity with an offering at the Central Jail." App. 71-72. Moreover, the court noted that "whether this 'program access' standard may reasonably be met or whether any restriction on access is reasonably related to a legitimate government objective is necessarily fact specific" and remained to be determined by the district court.

The Ninth Circuit did not disapprove of any aspect of the County's actual provision of services and programs beyond stating the incontrovertible opinion that "the County may not shunt the disabled into facilities where there *is no possibility of access to those programs.*" App. 70, (emphasis added). Such a conclusion flows from the *Yeskey* opinion, which applied the ADA to correctional settings. The court did not discount any particular security or correctional concern, or budgetary constraint, pointing out that the County had offered no explanation or justification, either in the district court or on appeal, for the significant differences between the vocational and recreational activities available to disabled and non-disabled detainees. App. 72. Thus, "while the County

has considerable discretion under the regulations to determine whether and how it can extend program accessibility, it cannot simply do nothing," as was the case here. App. 71, n. 38. In reviewing the *one* program for which the County did attempt to rationalize its failure to grant access to disabled detainees, the Ninth Circuit *approved* the governmental objective advanced as legitimate; the Ninth Circuit upheld the district court's finding that the Best Choice Program did not need to be made accessible to the disabled due to security concerns advanced by the County. App. 72.

Petitioner's assertion that the Ninth Circuit's opinion will "compel public entities that operate more than one jail or prison to *drastically reduce or eliminate valuable inmate programs and activities just to avoid ADA claims,"* is extreme and unsupportable. Pet. Brief, at 28. This same argument could have been advanced by colleges and universities facing desegregation orders, that they would close or cease to offer certain courses or programs if to do so would require that non-whites have access. Just as that argument would not have been countenanced fifty years ago in the face of requiring equal access to educational programs, it should not be countenanced in the context of the ADA's requirement that people with disabilities have equal access to the government's programs and services, even in a correctional setting. Under the Code of Federal Regulations, cited repeatedly by the Ninth Circuit, the county retains broad discretion in redistributing programs, altering placement at facilities, or taking other steps to make the County's programs usable by individuals with disabilities, short of curtailing those programs for all

detainees. 28 C.F.R. § 35.150(b).[8]

The D.C. Circuit's decision in *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910 (D.C.Cir. 1996), cited by Petitioner, does not create a circuit conflict, nor support Petitioner's claim that an important federal question is presented here. *Women Prisoners* concerned an equal protection and Title IX claim brought by a class of female prisoners, challenging the District of Columbia's provision of different educational programs to female prisoners than male prisoners. Neither of those issues is presented in the Ninth Circuit decision under consideration. To the extent that the decision is relevant at all, the Ninth Circuit echoed the D.C. Circuit's concern that proper deference should be paid to correctional officials, that all facilities might not need to be brought into parity, and that security and other legitimate governmental concerns may require certain differential treatment of detainees.

Moreover, the D.C. Circuit's handling of the equal protection issues also appears out of step with the Supreme Court's then most recent pronouncement on

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[8] 28 C.F.R. 35.135 provides in pertinent part: "A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section."

the type of scrutiny to apply to equal protection claims brought by women regarding unequal educational opportunities. *United States v. Virginia,* 518 U.S. 515 (1996). With respect to Virginia's efforts to create a separate military school for women, offering fewer programs and educational opportunities than Virginia Military Institute ("VMI"), which had historically excluded women, this Court held that Virginia had to advance an "exceedingly persuasive justification" for withholding from women the same training provided to their male counterparts. *Id.*, at 555-556. In so ruling, this Court rejected the host of justifications advanced by Virginia for offering parallel but inferior services to women, including that women might not benefit from VMI's intensive program, that facilities might have to be altered to accommodate combining the sexes, or that the existing facilities were comparable. As the Ninth Circuit did here, this Court pointed out the wealth of sports opportunities, playing fields and programing provided male cadets at VMI. Women, by contrast, like disabled detainees in the Orange County Jail system, had to make do with inferior or non-existent programs and facilities. While equality in access to educational programs in correctional institutions presents a far different question than equal access to the preeminent educational institutions of our country, it is difficult to square *Women Prisoner's* analysis of the total lack of access to programming in the D.C. prisons with the equal protection analyses articulated by the majority, and concurring opinions in *Virginia.*

Petitioner's final argument, that the County may eliminate all programs offered to detainees to avoid having to provide them to disabled detainees harkens back to municipalities' threats to close swimming pools and other facilities rather than accept integration as

the law. The threat that a losing party may decide to avoid a decision of the federal courts by abolishing completely the program or institution under review is not reason to grant *certiorari*, since that argument should have no influence on the ultimate resolution of the issues. Indeed, this Court has never shied from any interpretation of the law which imposes substantial costs on governmental entities, nor accepted the argument that the cost of compliance with a federal statute or constitutional provision trumps the basic principles embodied in such laws. This argument, if countenanced, could as easily be made by any governmental entity which provides unequal services and programs to disabled individuals, not just correctional facilities. To accept it as a ground to grant *certiorari* review would allow any public institution, library, public park, or school, to assert a special entitlement to review whenever a circuit court requires that it adjust its programs to provide equal services under the ADA.

CONCLUSION

For the reasons stated herein, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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October 15, 2008